No. 12,769

IN THE

United States Court of Appeals

For the Ninth Circuit

CLARENCE C. CAMINOS,
Appellant,

vs.

TERRITORY OF HAWAII,
Appellee.

On Appeal from the Supreme Court of the Territory of Hawaii.

BRIEF FOR APPELLANT.

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STATEMENT OF JURISDICTION.

By two indictments returned by a grand jury of the Territory of Hawaii defendant was charged with accepting bribes while a police officer of the police department of the City and County of Honolulu in violation of Section 10791 of the Revised Laws of Hawaii 1945. (T. 3-12.) The indictments were consolidated for trial. (T. 17.) After trial by jury and conviction, defendant was adjudged guilty on all counts of both indictments whereupon he perfected his appeal to the Supreme Court of the Territory of Hawaii. By decision (T. 157-175) and judgment of

that court (T. 176) the judgments of the trial court were affirmed on the 11th day of September, 1950. On the 15th day of September, 1950, defendant filed a petition for appeal to the United States Court of Appeals of the Ninth Circuit (T. 177) and on the same day the appeal prayed for was allowed. (T. 184.) In accordance with the order allowing appeal, an approved bond was given (T. 182), notice of appeal was filed. (T. 185.) An assignment of errors was likewise filed (T. 178) alleging error by the Supreme Court of the Territory of Hawaii, which error it is alleged resulted in the defendant's being deprived of his rights under the Constitution.

It is believed that the United States Court of Appeals for the Ninth Circuit has jurisdiction to review the judgment of the Supreme Court of the Territory of Hawaii (T. 176) by reason of the provisions of Section 128 of the Judicial Code,

> The circuit courts of appeals shall have appellate jurisdiction to review by appeal or writ of error final decisions—
>
> First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title.
>
> Second. In the United States district courts for Hawaii and for Porto Rico in all cases.
>
> Third. In the district courts for Alaska, or any division thereof, and for the Virgin Islands, in all cases, civil and criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is

involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $1,000; in all other criminal cases where the offense charged is punishable by imprisonment for a term exceeding one year or by death, and in all habeas corpus proceedings; and in the district court for the Canal Zone in the cases and mode prescribed in sections 1307, 1324, 1336, and 1341 to 1356 of Title 48.

STATEMENT OF THE CASE.

Each indictment charged defendant with receiving bribes in violation of Section 11071 of the Revised Laws of Hawaii 1945. In material part the section reads:

> "Every executive * * * officer * * * who corruptly accepts any gift, gratuity, beneficial service, or act or promise of either, under an agreement or with an understanding that he shall in the exercise of any function in his capacity as aforesaid * * * decide or act in any particular manner in any cause, question, proceeding or matter pending or that may by law come or be brought before him, shall be punished by imprisonment at hard labor not more than five years, or by fine not exceeding one thousand dollars."

The first of the two indictments contained five counts, each charging that on or about a specified date and while he was a police officer of the City and County of Honolulu, defendant corruptly received a specified sum of money from one Paul Au in said

city and county with the agreement or understanding that he would not, in the exercise of his function and capacity as such police officer, arrest and prosecute and give evidence against Paul Au for and on account of the operation by Paul Au of a gambling game in said city and county. These counts covered a period from August 18, 1945 to September 16, 1945. The other indictment contained two similar counts—one charging violation of the section on January 6, 1946, and the other on January 13, 1946.

At the time of the alleged violations of the section, defendant was a police officer in the Honolulu Police Department and head of the vice squad. He joined the department December 4, 1928, became head of the vice squad May 19, 1945, and was removed March 30, 1946. His predecessor was a Captain Hitchcock. A function of the vice squad was to suppress gambling in Honolulu. Normally, the gambling detail of the vice squad consisted of a sergeant and three or four subordinates. Under defendant, the sergeant was William Clark, and some of the subordinates were officers Fujiyama, Ho, Kingsley, Moses, Murray, Nishida, and Peresa.

Clark joined the department in 1926. He served intermittently on the vice squad from 1932 to 1944. From November 1944 until his removal on March 30, 1946, he served continuously on the gambling detail. He was the prosecution's key witness at the trial. Testifying under promise of immunity and a further promise that he would receive a police officer's retirement pay, Clark confessed that he had used his posi-

tion as a police officer to amass over $136,000 from bribes received from Chinese gamblers to protect their operations and from other corrupt practices.

One of the Chinese gamblers from whom Clark confessed receiving bribes was Paul Au. In the vernacular of Clark, a bribe was a "payoff": in the vernacular of Au, a "dong dong". Au was a convicted felon with a long criminal record. He owned a building on Beretania Street opposite Hall Street in Honolulu. Prior to October 1944 he operated a house of prostitution on the premises, charging each of the 10 to 20 inmates $75 a day for plying her trade. But in October 1944 he opened up a gambling house on the second floor of the building under the name of Honolulu Rooms. The jury visited the premises during the course of the trial and an elaborate description thereof by the trial judge appears in the transcript on appeal from the circuit court to the Territorial Supreme Court. It is enough to say here that entrance thereto was from Beretania Street through a store on the ground floor and that from a hallway back of the store a stairway ascended to the gambling games on the second floor. Au also provided barred and barricaded doors, peepholes, lookouts, and emergency exits to resist and repel police raids or unwanted visitors and to facilitate dispersing the gamblers in the event of raids. Au added a further precaution: he maintained and controlled an array of 10 to 12 vicious dogs at what he considered strategic protective points.

Paul Au testified as a witness for the prosecution in its case in chief under promise of immunity. His testimony preceded that of Clark. On direct examination Au testified that after a temporary suspension gambling operations were resumed at the Honolulu Rooms on June 9, 1945, following a conversation with Clark. Virtually each week thereafter, so Au testified, he delivered two envelopes to Clark containing the "dong dong", or "payoff", or bribe money for protection—one unsealed with the bribe for Clark and "his boys", usually $900—the other sealed with the bribe for defendant, usually $900. A similar system of envelopes was used by Au for payment of "bonuses" for Clark and defendant. Au's testimony extended to the periods specified in the indictments, and to periods not specified thereon. All the foregoing testimony by Au came in over defendant's objections and exceptions.

In the prosecution's case in chief and under promise of immunity, Clark testified on direct examination that his first contact with Au was in January 1945 when Captain Hitchcock sent him to Au and he arranged for a "payoff" to the vice squad. This testimony came in over defendant's objections and exceptions. After defendant became head of the vice squad in May 1945, so Clark testified, defendant asked Clark "what was the Paul Au payoff for protecting his game", and Clark replied $900 weekly for the head of the squad and $900 weekly for Clark and his men, and defendant said it was "agreeable" to him. This testimony also came in over defendant's objections

and exceptions. Weekly thereafter, according to Clark on direct examination, he received two envelopes from Au—one unsealed and containing the stipulated "payoff" or "dong dong" for Clark and his "boys", of which the "boys" received $100 each and Clark the balance—and the other sealed and to be delivered to defendant. And, still according to Clark on direct examination, the same system of unsealed and sealed envelopes was followed in connection with a "bonus" to Clark and defendant based on the profits of a "banking game" subsequently conducted by Au at the Honolulu Rooms. Clark also testified that on one occasion, the date not being stated, he opened one of the sealed envelopes he was delivering to defendant and substituted bills of smaller denomination for bills he found therein.

In the course of his direct examination Clark testified that he put the bribes he received from Au in a vault at the Bishop National Bank and had thereby accumulated $128,000 in cash and a "few thousand in bonds". Under cross-examination, however, it developed that his bribes from Au did not exceed $29,000, that the accumulation began in 1942, and that the sources of the accumulation included a racket described by Clark as "packing home gamblers after blackout" and from which he often averaged $250 a night in 1942 and 1943, and bribes received by him from certain Chinese gamblers known as Fat Loo, D. C. Chang, and Small Snake. On redirect examination the court permitted the prosecution to interrogate Clark in detail as to the bribes he received from the

Chinese gamblers above named and certain others known as Hot Dog and Big Snake, and also defendant's participation in such bribes. Defendant objected to the line of interrogation and moved to strike the testimony. The objections were overruled and the motions to strike denied.

One of the witnesses for the prosecution in its case in chief was Thomas Rodenhurst, a police officer. On direct examination Rodenhurst testified that in November 1945 in a conversation with defendant about gambling in the Pearl City district, defendant asked the witness to assist in establishing cockfighting in the district, said that he would attend to all arrangements, and told the witness "you'll get yours", and when the witness stated that he was not interested defendant remarked "only a fool dies poor". The rulings of the court admitted this testimony over defendant's objections and exceptions.

Another witness for the prosecution in its case in chief was the Chinese gambler known as Fat Loo. He was another convicted felon testifying under promise of immunity. On direct examination Fat Loo testified that he operated a gambling place in 1945 and was able to operate because he was paying Clark $700 weekly for protection, and that he also collected bribes from other Chinese gamblers and paid them to Clark. The rulings of the court admitted the Fat Loo testimony over defendant's objections and exceptions.

When the prosecution rested, defendant moved for a directed verdict on the ground that there was a

variance between the proof and the allegations of the indictments, in that the indictments charged defendant with receiving bribes from Paul Au whereas the proof was directed to that Paul Au paid bribes to Clark and that Clark paid bribes to defendant.

In the case for the defense, eleven character witnesses testified that the reputation of defendant for truth, honesty, integrity, and veracity, was good. These witnesses, listed in the order they testified, and with their occupations and years of acquaintance with defendant were as follows: Dewey Mookini, captain, Honolulu Police Department, several years; Ernest Claes, Catholic priest, 10 years; George Kinney, district agent, Standard Oil Company, 30 years; Edward Burns, real estate broker, formerly assistant chief of police, Honolulu Police Department, 10 years; Sanford Parker, real estate and insurance broker, 10 years; William Cleghorn, ranch manager, Hawaiian Pineapple Company, 25 years; Theodore Nobriga, director of Recreation, Honolulu, formerly captain uniform patrol division, Honolulu Police Department, 7 years; William Hoopai, Chief of Police, Honolulu Police Department, formerly clerk of the circuit court, 18 years; Sydney Gatton, salesman, Honolulu Paper Company, 20 years; Lawrence Kunihisa, department store manager, 20 years; Leon Straus, captain of detectives, Honolulu Police Department, 10 years.

Five of the members of the gambling detail of the vice squad while Clark was sergeant and defendant the head, testified as witnesses for the defense. Listed in the order they testified they were: Robert Kingsley;

Louis Peresa; Theodore Murray; Ernest Moses, and Robert Nishida. Each testified that he was under indictment for bribery. Each testified that defendant as head of the vice squad had issued orders to suppress gambling in Honolulu. Each denied receiving bribes from or through Clark or any other person. Each later stood trial on the indictments, and each was acquitted.

Defendant was a witness in his own behalf. During the course of his direct examination he testified that when he became head of the vice squad he issued orders to members of the gambling detail to suppress gambling in Honolulu. He denied receiving bribes from or through Clark or any other person. He contradicted the Rodenhurst testimony. He had been promised immunity by the prosecution in exchange for information implicating Chief of Police Gabrielson, Assistant Chief of Police Hoopai, and Assistant Chief of Police Dan Liu in receiving bribes, and his reply to the offer was that he had no information of that character.

On cross-examination defendant was asked if he knew Jose Tantog of Waialua and answered that he had arrested him for gambling and had bought a discarded boat from Tantog for $10. Defendant was also asked if he knew Vincente (Tony) Acquita of Wahiawa and answered that he had arrested him for cockfighting. When defendant was asked if he had received any money from Acquita, he answered "no". Defendant was further asked if he knew Catalino Priopios of Waimea and answered that he had ar-

rested him for cockfighting and gambling. When asked if he had received $25 weekly from Priopios for permitting him to run gambling games defendant answered "no". And defendant was asked on cross-examination if he knew Richard Kazuo Mikami of Pearl City and answered that he had permitted Mikami and several others to use a beach cottage at Mokuleia for a week end. When asked if he had been paid $200 or any other sum by Mikami for protection, defendant answered "no".

In its case in rebuttal, the prosecution produced Mikami, Tantog, and Priopios as witnesses. Over defendant's objections, Mikami was permitted to testify that in November 1945 he paid defendant $200 for use of a beach cottage in 1943 or 1944; that he may have made a statement in the office of the public prosecutor on April 3, 1946, to the effect that when he paid the $200 he told defendant he was operating a crap game; that the statement was not true; and over defendant's objections, a stenographic report of the statement of the witness on April 3, 1946, was admitted in evidence. Over the defendant's objections, Tantog was permitted to testify that he gave bribes to defendant in 1944 and also gave defendant a boat. And over defendant's objections, Priopios was permitted to testify that commencing in 1943 he paid weekly bribes of $25 to defendant for a year.

In his case in surrebuttal, the defendant denied receiving any money from Tantog or Priopios, and restated that he had bought the boat from Tantog for $10. Defendant's testimony that he bought the boat

for $10 was corroborated by witness B. F. Chun, proprietor of a grocery store and meat market at Wahiawa, who had transported the boat from Waialua to Wahiawa on a small Chevrolet truck owned by the witness. With the conclusion of the Chun testimony, both sides rested.

A very important claim of defendant on his appeal is that he was deprived of a fair trial and denied the due process of law guaranteed by the Bill of Rights through prejudicial misconduct of the trial judge. This forms the basis of Assignment of Error No. III. (T. 179.)

Another claim of defendant on his appeal is that he was deprived of a fair trial and denied the due process of law guaranteed by the Bill of Rights through misdirection of the jury. This forms the basis of Assignments of Error Nos. IV and V. (T. 180.)

The jury found defendant guilty on all counts of the two indictments. A motion for new trial was made and denied. Defendant was sentenced to imprisonment for 5 years on the first count in the first indictment and fined $1000 on each of the four other counts. Defendant was sentenced to imprisonment for 5 years on the first count of the other indictment, to run consecutively with the sentence pronounced on the first count of the first indictment, and fined $1000 on the other count of the second indictment.

SPECIFICATION OF ERRORS RELIED UPON.

1. The Supreme Court of the Territory of Hawaii erred in holding that evidence of alleged separate and independent crimes of bribery and attempted bribery and not referred to in any indictment or information was admissible for that by so holding the defendant was deprived of his rights under the Constitution of the United States to a fair and impartial trial; to be informed of the nature of the charges against him; to present evidence on his behalf; and to be protected against another prosecution for the same offense. (T. 179.)

2. The Supreme Court of the Territory of Hawaii erred in holding (without giving any reason for so holding) that defendant's assignment of error committed by the trial court in denying his motion for a directed verdict, was without merit, for that in so holding defendant was deprived of his rights under the Constitution of the United States to a fair and impartial trial; not to be held to answer except by indictment; and to be protected against another prosecution for the same offense. (T. 179.)

3. The Supreme Court of the Territory of Hawaii erred in holding (without giving any reason for so holding) that the defendant's assignment of error complaining of the prejudicial misconduct of the trial judge as a result of which defendant was denied a fair trial and deprived of the due process of law guaranteed by the Constitution of the United States and the Bill of Rights therein contained was without merit. (T. 179.)

4. The Supreme Court of the Territory of Hawaii erred in holding (without giving any reason for so holding) that the defendant's assignments of error committed by the trial court in refusing to instruct the jury as to the law applicable to the case in certain specified respects as requested by defendant were without merit, for that in so holding defendant was deprived of his right under the Constitution of the United States to a fair and impartial trial and to the equal protection of the laws. (T. 180.)

5. The Supreme Court of the Territory of Hawaii erred in holding (without giving any reason for so holding) that defendant's assignment of error committed by the trial court in giving the following instruction requested by the prosecution, to-wit: Territory's Requested Instruction No. 8: "The court further instructs you, gentlemen of the jury, that if you find from the evidence in this case beyond a reasonable doubt that the defense set up by the defendant is a false and fabricated defense and was purposely and intentionally invoked by the said defendant then you are instructed that such a false and fabricated defense forms the basis of a presumption against him because the law says that he who resorts to perjury to accomplish an end, this is against him and you may take such action as the basis of presumption of guilt" was without merit, for that in so holding defendant was deprived of his right under the Constitution of the United States to a fair and impartial trial and to the due process of law.

ARGUMENT OF THE CASE.

SPECIFICATION OF ERROR NO. 1.

THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN HOLDING THAT EVIDENCE OF ALLEGED SEPARATE AND INDEPENDENT CRIMES OF BRIBERY AND ATTEMPTED BRIBERY AND NOT REFERRED TO IN ANY INDICTMENT OR INFORMATION WAS ADMISSIBLE FOR THAT BY SO HOLDING THE DEFENDANT WAS DEPRIVED OF HIS RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES TO A FAIR AND IMPARTIAL TRIAL; TO BE INFORMED OF THE NATURE OF THE CHARGES AGAINST HIM; TO PRESENT EVIDENCE ON HIS BEHALF; AND TO BE PROTECTED AGAINST ANOTHER PROSECUTION FOR THE SAME OFFENSE (T. p. 179).

In the course of his direct examination Clark testified that he put the bribes he received from Au in a vault at the Bishop National Bank and had thereby accumulated $128,000 in cash and a "few thousand in bonds". (T. 78.) Under cross-examination, however, it developed that his bribes from Au did not exceed $39,000.00, and that the sources of the accumulation included bribes received by him from certain Chinese gamblers known as Fat Loo, D. C. Chang, and Small Snake. (T. 78-80.) On redirect examination the court permitted the prosecution to interrogate Clark in detail as to the bribes he received from the Chinese gamblers above named and certain others known as Hot Dog and Big Snake, *and also defendant's participation in such bribes.* (T. 80-83.)

The trial court should have excluded the testimony and the Supreme Court of Hawaii should have ordered a new trial, not only because its admission violated the elementary rule of evidence—so elementary as to need no citation of authority in support—

that redirect examination must be confined to matters covered by the cross-examination.

Its admission violated the due process of law guaranteed the defendant by the Bill of Rights. By the injection of the testimony into the case the prosecution was permitted in its case in chief to introduce evidence tending to establish bad character of the accused. That is never permissible. (*Greer v. United States,* 245 U.S. 559, 38 S.Ct. 209, 210, 62 L.Ed. 469; 20 American Jurisprudence 304-305, sec. 325; 1 Wigmore on Evidence 456, sec. 57.)

In *Greer v. United States,* 245 U.S. 559, 38 S.Ct. 209, 210, 62 L.Ed. 469, the problem was whether the accused was entitled to an instruction that he was presumed to be of good character. In solving the problem Mr. Justice Holmes said:

> "Obviously the character of the defendant was a matter of fact which, if investigated, might turn out either way. It is not established as a matter of law that all persons indicted are men of good character. If it were a fact regarded as necessarily material to the main issues it would be itself issuable, and the Government would be entitled to put in evidence whether the prisoner did or did not. As the Government cannot put in evidence except to answer evidence introduced by the defense the natural inference is that the prisoner is allowed to try to prove a good character for what it may be worth but that the choice whether to raise that issue rests with him."

In 20 American Jurisprudence 304-305, sec. 325, the rule is stated as follows:

> "It is generally recognized that the state cannot, in a criminal prosecution, introduce evidence establishing the character of the accused, unless the accused first puts his good character in issue by introducing evidence to sustain his good character or reputation, or has become a witness in his own behalf. The character of a person accused of crime is not a fact in issue in a prosecution for such crime, and the state cannot, in its evidence in chief, for the purpose of inducing belief in the defendant's guilt, introduce evidence tending to show his bad character or that he has a tendency or disposition to commit the crime with which he is charged. It is clear that because an accused person may have a bad character it does not necessarily follow that he is guilty of the particular offense charged."

And in 1 Wigmore on Evidence 456, sec. 57, the rule is thus stated:

> "The rule, then, firmly and universally established in policy and tradition, is that the prosecution may not initially attack the defendants' character."

But above all, the testimony should have been excluded because its admission violated the general rule that on the trial of a person accused of crime proof of other distinct and independent crimes or offenses is not admissible. (*Boyd v. United States,* 142 U.S. 450, 456-458, 12 S.Ct. 292, 35 L.Ed. 1077; *Tedesco v. United States,* 9 Cir. 1941, 118 F. (2d) 737, 739; *Gianotos v. United States,* 9 Cir. 1939, 104 F. (2d) 929, 932; *Territory v. Chong Pang Yet,* 27 Haw. 693, 695.)

The indictments did not charge defendant with receiving bribes from Clark or from any of the Chinese gamblers Clark named in the line of testimony under discussion. Unless admission of the testimony can be justified under an exception to the general rule, it must inevitably follow that admission of the testimony was prejudicial error.

An exception to the general rule is "is that, where it is necessary to show a particular criminal intent as constituting an ingredient factor of the offense charged, evidence of other offenses similar to that charged is admissible." (*Territory v. Chong Pang Yet,* 27 Haw. 693, 695; *Territory v. Awana,* 28 Haw. 546, 547-548.) But that exception can have no application here. Intent was not an issue at the trial. Either defendant asked for and took the money from Paul Au, and was guilty, or he did neither, and was innocent. The cases of *Crinnian v. United States,* 6 Cir. 1924, 1 F. (2d) 643, and *Kempe v. United States,* 8 Cir. 1945, 151 F. (2d) 680, are directly in point.

In *Crinnian v. United States,* 1 F. (2d) 643, followed in *Harvey v. United States,* 2 Cir. 1928, 23 F. (2d) 561, 563-564, the defendant was charged with receiving certain bribes. At the trial the prosecution was permitted to introduce evidence showing that defendant had received other and similar bribes. This was held reversible error, the court saying at page 645:

> "It is quite conceivable that former conduct of a prohibition agent which involved a violation of the Prohibition Act might be closely enough

> connected, in time or in substance, to be relevant where the intent was controlling. Such a case might appear where an established fact permitted ambiguity as to intent, or where the taking of money by a prohibition agent might be enticing or might be detecting. There is no such issue here. Either Crinnian asked for and took the money, and is guilty, or he did neither, and is innocent. The relative credibility of Crinnian and Stinson (the bribe giver) was the issue. Proof that Crinnian had formerly violated the Prohibition Act could have no bearing on the issue, except by showing that he had the 'criminal mind' and this is the very inference that the common law calls irrelevant."

And in *Kempe v. United States,* 151 F. (2d) 680, the defendant was charged with making certain sales of gasoline in violation of price control laws. At the trial the prosecution was permitted to introduce evidence showing that defendant had made other and similar sales. This was held reversible error, the court saying at pages 687 to 690:

> (687) "The general rule is that in a criminal prosecution proof which shows or tends to show that the accused is guilty of the commission of other crimes and offenses at other times, even though they are of the same nature as the one charged in the indictment, is incompetent and inadmissible for the purpose of showing the commission of the particular offense charged in the information. It is not competent to prove that the accused committed other crimes of a like nature for the purpose of showing that he would be likely to commit the crime charged in the infor-

mation. Evidence of other crimes compels a defendant to meet charges of which the information or indictment gives no information, confuses him in his defense and raises a variety of false issues. Thus the attention of the jury is diverted from the charge contained in the indictment or information. * * *

(688) In 1 Wharton's Criminal Evidence, 11th ed., sec. 360, pp. 567, 568, it is said: 'Certain conditions must always exist as a predicate to the admission of evidence of other crimes. Such evidence, being a departure from the general rule of exclusion, is only admitted to render more certain the ascertainment of the exact truth as to the charge under trial. In any loose relaxation of the rule the danger to the accused (689) is that evidence may be adduced of offenses that he has not yet been called upon to defend, of which, if fairly tried, he might be able to acquit himself.' 'In the first place, the collateral offense for which an accused has not been tried tends to prove his inclination towards crime, that is to render more probable his guilt of the charge under trial, which is an absolute violation of the rule. It does not reflect in any degree upon the intelligence, integrity, or the honesty of the purpose of the juror that matters of a prejudicial character find a permanent lodgment on his mind, which will inadvertently and unconsciously enter into and affect his verdict. The juror does not possess that trained and disciplined mind which enables him either closely or judicially to discriminate between that which he is permitted to consider and that which he is not. Because of this lack of training, he is unable to draw con-

clusions entirely uninfluenced by the irrelevant prejudicial matter within his knowledge.' * * * The language used by this court in *Grantello v. United States,* 8 Cir., 3 F. (2d) 117, 119, is peculiarly applicable to the facts in this case. There the court said: 'The defendant had demurred to each count of the indictment on the ground that it was insufficient, and did not set out the facts and circumstances of the offense, so as to apprise him with what he was charged, or to enable him to prepare his defense, and those demurrers were overruled. He presented to the court below a petition for a bill of particulars and that petition was denied. He was not charged in the indictment with any of the sales, possessions, or offenses about which Gunderson and Prewitt testified, nor was he on trial for any thereof. They were in no way connected with any of the offenses charged in the indictment, and no question of the intent of the defendant was material or in issue in this case. It is neither competent, fair, nor just to a defendant to receive evidence against him of like offenses to those charged in the indictment under which he is on trial where no question of his intent is in issue and no connection between such offenses and those charged is proved. (cases cited.) Had the government desired to introduce testimony of sales it claimed that the defendant made on dates prior to the sales alleged in the information, it would have been nothing more than fair to have legally and formally charged the defendant with the making of such sales. He would have thus been apprised of the charge against him and possibly been prepared to introduce testimony to refute the truth of the charge. Instead of fol-

lowing such procedure the government sought to and did prove by leading questions over the objections of the defendant the other independent sales made prior to the dates charged in the information. When the gasoline was delivered and the ration coupons paid for it, the offenses were complete and at an end. (690) The general rule is the outgrowth of the long and sane experience, study and wisdom of jurists and of our common-law jurisprudence. An accused, whether guilty or not, is entitled to a fair and impartial trial of the charge against him. He may be a bad man generally and may have committed other crimes for which he has not been punished, but justice forbids his conviction except of the offense of which he is charged. The exceptions to the rule are well established and when properly applied are conducive to justice but should not be so extended as to destroy the rule. The incompetent evidence was prejudicial to the rights of the defendant and demands a reversal of the judgment of conviction."

For the reasons pointed out, the defendant's Constitutional rights were violated by permitting the witnesses Rodenhurst, Lawrence Fat Loo, Mikami, Tantog, and Priopios to testify.

Rodenhurst testified:

"Q. During the month of November, 1945, did you see the defendant Clarence Caminos?

A. I did.

Q. Did you see him at the Pearl City Police Station?

A. I did.

Q. Did you have a conversation with him?

A. I did.

Mr. Patterson. Objected to upon the ground it's irrelevant, immaterial and incompetent, not within the issues of this case.

The Court. I have no idea whether it is or not, Mr. Patterson; objection overruled.

Mr. Patterson. Save an exception.

Mr. Lewis. Will you tell us what that conversation was, Mr. Rodenhurst, describing the circumstances?

A. Mr. Caminos came to my office one day to talk to me about gambling activities in my district; he said in part that he had——

Mr. Patterson (interrupting). Now just a minute; I object to any testimony of this witness about any gambling activities in that district covering the year 1945; it's an entirely separate matter, has nothing to do with this particular issue at all, it's not binding on this defendant; we have no opportunity to meet it, it's conversation that took place about something in another district altogether, and it is not in corroboration and it is no part of the evidence in this case, and it tends to establish a separate and distinct transaction which is not in issue here in any way whatsoever.

The Court. Objection overruled.

Mr. Patterson. Save an exception.

The Court. Exception allowed.

Mr. Lewis. Will you continue?

A. He talked to me about gambling activities in my district with reference to cockfights; he wanted me to assist him in permitting the games to be held——

Mr. Patterson (interrupting). May our objection run to all this line of testimony, if Your Honor pleases?

The Court. Yes.

A. He wanted me to assist him in permitting the game to be run in the district of Ewa; he said that he'd like to establish these cockfights, particularly down at the Ewa Beach Lots section, and that he would attend to all the particulars and make all the arrangements. I asked him what part I would play in it, and he said, 'Let them play', and, he said, 'You'll get yours'; and I said, 'What do you mean by that, how much are you going to give me, is that what you mean?' He said, 'Yes.' He would not stipulate as to any amount, he just said, 'You'll get yours.' I said, 'What are your plans?' He said, 'To permit the game to run' in my district one week, the following week to go some place else, in Wahiawa, Kailua, and then down to Kaneohe another week, and then go back to Honolulu, and then revolve it around the district in that respect. I told Mr. Caminos that I was not interested in any such plan, that I'll have no part of it, that I was not interested in any such money under any circumstances, and that I refused to be a part of his plan, than if he wanted to go ahead with his own idea that's his business but I'll have no part of it and any games that are run in my district that I know about or my men know about will be raided.

Q. Did he say anything further than that?

A. Well, he told me not to be a 'damn fool,' he said, 'Only a fool dies poor'; then I said, 'Then I'm a damn fool, because I don't want any part of you and I'll die poor.'' (T. 84-86.)

Lawrence Fat Loo testified:

''Mr. Lewis. Mr. Loo, how did you make a livelihood?

A. Gambling.

Q. Did you operate a gambling place in the year 1945?

A. I did.

Q. And where was that located?

Mr. Patterson. That's objected to upon the ground it's irrelevant, immaterial and incompetent, not binding upon this defendant; should be connected up.

Mr. Lewis. If the Court please, we'll connect it up in connection with the previous testimony.

The Court. Objection overruled.

Mr. Patterson. Save an exception.

A. What was the question again?

Mr. Lewis. Where did you operate this gambling establishment?

A. On Pauahi and Maunakea.

Mr. Patterson. Talk a little louder, please, so we can hear you.

A. On Pauahi and Maunakea.

Mr. Lewis. In the City and County of Honolulu?

A. Yes.

Q. And did you operate there in the months of August and September, 1945?

A. Yes.

Q. Will you tell us how you were able to operate?

A. Well, we were paying——

Mr. Patterson (interrupting). Now I object to this testimony; you can see what is going to be—upon the ground it's irrelevant, immaterial and incompetent, not binding upon this defendant, it's hearsay, not within the issues of this case; anything that this man done is not binding upon Caminos.

The Court. You're a better mind-reader than the Court, Mr. Patterson; I'll have to overrule the objection from what the witness has said.

Mr. Patterson. It's right there; you don't have to be a mind-reader.

The Court. Your objection and exception may go to the entire line.

Mr. Lewis. May we have the question read?

(Reporter reads last question and incomplete answer.)

The Court. Speak up, Mr. Loo.

A. Yes. We are paying Sergeant Clark to——

Juror (interrupting). I can't hear at all.

Mr. Lewis. Members of the jury can't hear you, Mr. Loo; talk up loud.

A. Well, we were paying Sergeant Clark $700.00 a week so that we will not be raided.

Q. And how long did those payments continue?

Mr. Patterson. I ask that that answer—I didn't know he had finished; I ask that that answer be stricken upon the ground that it's irrelevant, immaterial and incompetent, it's not within the issue of this case, it's an entirely different transaction than anything that is alleged in this indictment; this man is charged with accepting bribes from Paul Au, and for this man to testify about a supposed payment, to a third person with reference to a game and a different man altogether is an entirely different crime which we'll be prepared to meet if it's ever presented, if it isn't presented at this time the defense is entitled to be informed and, Your Honor, we come in here in a great crime that's given in evidence here of the crime alleged, the crime between him and a man that he was bribing, and it's not bind-

ing upon Caminos; Your Honor, it's an entirely separate transaction; we have authorities about that if Your Honor wants to see them.

The Court. The Court is familiar with the general background; the evidence is permitted solely from the standpoint of the law allowing evidence of other like transactions to bear upon the credibility of witnesses in the specific transaction now charged, now too remote in time but of the same character; and your objection is overruled.

Mr. Patterson. We'd like to cite authorities on that, Your Honor.

The Court. I'm not wasting time now; you can do it with the appellate court; you've got your exception.

Mr. Patterson. I'm not asking about any appellate court, Your Honor; I'd like to be heard.

The Court. I have ruled; we're pau.

Mr. Patterson. I save an exception, if Your Honor pleases, to not being allowed to address the Court; I assign it as error, prejudicial to the rights of this defendant.

The Court. Your assignment is noted; the Court has ruled, and that is ended on this episode, Mr. Patterson; you'll kindly sit down.

Mr. Patterson. We save an exception, if Your Honor pleases.

Mr. Lewis. Mr. Loo, you stated that you paid to Sergeant Clark the sum of $700.00 a week; how long did those payments continue?

A. They continued up to the week of the police investigation.

Q. Do you recall the date of that?

A. I don't remember.

Q. Do you remember what year it was in?

A. 1946.

Q. Do you remember the month or what part of the year it was in?

A. The early part.

Q. Mr. Loo, did you make collections from any other gambling house other than your own?

A. I did.

Q. What gambling houses were those?

A. One on Beretania Street.

Q. Who was the operator of that one?

A. Hong Lee.

Q. Is he also known as 'Small Snake'?

A. Yes.

Q. How much did you collect from him?

A. 700.

Mr. Patterson. Objected to upon the ground it's irrelevent, immaterial and incompetent, not within the issues of this case, the collection of money by this man from a man by the name of 'Small Snake' who was never in this case, who has never been mentioned in it, and to have this man testify about money which he paid to him, to 'Small Snake' for a certain bribe is not binding upon the defendant Caminos.

The Court. The objection is of the same character; the court has understood, Mr. Patterson, that your objection similarly stated goes to the entire line; I don't know that there's any necessity for specifically renewing it; that Court's faith and confidence in giving it to you that way has not been withdrawn; I understand it goes to the entire line of this witness, and so stated to you when you made your first objection.

Mr. Patterson. I think this question is a little different; we save an exception.

The Court. Exception allowed; and I again state that your objection and exception goes to the entire line of the evidence from this witness having to do with other offenses.

Mr. Patterson. On every possible ground that can be put forth.

The Court. Yes, that you've put forth, and if any new ones you're at liberty to state them.

Mr. Lewis. Mr. Loo, you say you collected from 'Small Snake'?

A. Yes.

Q. How much did you collect from him?

A. $700.00 a week.

Q. During what year?

A. '45.

Q. 1945?

A. Yes.

Q. What did you do with that money that you collected from 'Small Snake'?

A. I gave that to Bill Clark.

Mr. Patterson. Speak up, Mr. Loo.

Mr. Lewis. You turned that over to Bill Clark?

A. Yes.

Mr. Lewis. No further questions." (T. 88-93.)

Mikami was introduced by the prosecution as witness in its case in rebuttal.

Defendant had been a witness in his own behalf. On cross-examination he was asked if he knew Richard Mikami and answered that he had permitted Mikami and several others to use a beach cottage at Mokuleia for a week end. On cross-examination he was also asked if he had been paid $200 or any

other sum by Mikami for protection, and answered "no".

Over defendant's objections, Mikami was permitted to testify that in November 1945 he paid defendant $200 for use of a beach cottage in 1943 or 1944; that he may have made a statement in the office of the Public Prosecutor on April 3, 1946, to the effect that when he paid the $200 he told defendant he was operating a crap game; that the statement was not true; and over defendant's objections, a stenographic report of the statement of the witness on April 3, 1946, was admitted in evidence. (T. 93-131.)

The rule applicable here was stated by the Supreme Court of the Territory of Hawaii in *Territory v. Izumi,* 34 Haw. 209, as follows, at pages 212 and 213:

> "The accused having elected to bring into the case a collateral issue it was clearly the right of the prosecution to refute, if it could, the defendant's testimony upon that issue. * * * Wharton correctly states the rule to be that 'Testimony about which a witness is to be impeached must be material and relevant. Since the answers of a witness given upon cross-examination on any irrelevant or collateral matter are conclusive and binding on the cross-examiner, such witness may not be contradicted or impeached upon an immaterial or collateral matter or issue about which he testified on cross-examination by the party seeking to impeach him, and especially not by the admission of substantive evidence. This limitation, however, applies only to answers on cross-examination. It does not affect answers on the examination in chief. If, therefore, the irrele-

> vant matter is given on direct examination the witness may be contradicted on it.' (3 Wharton's Criminal Evidence (11th ed.), sec. 1353.)"

On an application of the foregoing rule the prosecution was bound by the answers given by defendant on cross-examination respecting Mikami, and the court erred in admitting substantive evidence by Mikami on a collateral issue and carrying a suggestion that Mikami bribed defendant. Moreover, in a case where the witness should not have been permitted to testify at all in rebuttal, there can be no doubt that the error was aggravated by the rulings of the court permitting the prosecution, in protracted interrogation, to impeach the witness by his former statements detrimental to the defendant.

Like the witness Mikami, the witnesses Tantog and Priopios were called by the prosecution as part of its case in rebuttal. Their evidence is printed in the Transcript of the Record in this Court. Tantog's testimony appears on pages 132-140. Priopios' testimony appears on pages 140-143.

It is respectfully submitted that the error committed in this case in admitting evidence of other instances of purported bribery is analogous to the error committed in *Territory v. Blackman,* 32 Haw. 460. There is no difference in the legal principle involved in both. In the *Blackman* case, the prosecution was permitted to adduce evidence of alleged embezzlements other than the one charged. In this case the prosecution was permitted to adduce evi-

dence of alleged acts of bribery other than the acts charged.

Said Hawaii's Supreme Court in the *Blackman* case at page 469:

> "* * * The embezzlement of Aviation of Delaware Stock or its proceeds and the embezzlement of Mrs. Lillie's credit balance, which it is claimed by the Territory were committed, involved different amounts, and were committed, if at all, at different times. The subject matter of the two transactions was likewise entirely different and unrelated. One occurred on May 17 and the other on July 2. The former involved $750 and the latter $5,352.48, and they were each susceptible of proof wholly independently of the other. In fact, the evidence adduced by the Territory relating to the Aviation of Delaware stock was distinct from that pertaining to the dealings in Exeter Oil.
>
> "In the leading case of *Goodhue v. The People,* 94 Ill. 37, the defendant, a county treasurer, was indicted for the crime of embezzlement of $4,508.37. In the course of the trial evidence was given tending to prove at least three different acts of embezzlement, occurring at different times and under varying circumstances, and involving different amounts. The defendant made a motion for an election which was overruled. The court in discussing the question involved said (p. 51): 'If two or more offences form part of one transaction, and are such in nature that a defendant may be guilty of both, the prosecution will not as a general rule be put to an election, but may proceed under one indictment for the several offences, though they

be felonies. The right of demanding an election and the limitation of the prosecution to one offence, is confined to charges which are actually distinct from each other and do not form parts of one and the same transaction. In misdemeanors the prosecution may, in the discretion of the court trying the case, be required to confine the evidence to one offence, or where evidence is given of two or more offences, may be required to elect one charge to be submitted to the jury, but in cases of felony it is the right of the accused, if he demand it, that he be not put upon trial at the same time for more than one offense, except in cases where the several offences are respectively parts of the same transaction. 1 Wharton Crim. Law, § 423; 1 Bishop Crim. Pr. 459. This doctrine is recognized by this court in *Lyons v. The People,* 68 Ill. 275, and is believed to accord with the practice in this state from its earliest days. It was therefore error, in this case, to refuse the application of the accused for the benefit of this rule.' "

And, again, at page 473 of the *Blackman* case, the Supreme Court of Hawaii says:

"A compelling reason for requiring an election under the circumstances of this case is that it is impossible to determine from the verdict of the jury upon which transaction the defendants were found guilty. Some of the jurors may have concluded that in their dealings with the Aviation of Delaware stock in May 17 the defendants committed embezzlement and that this was the only embezzlement shown by the evidence. Others may have concluded that there was no embezzlement in that transaction but that the defendants

had fraudulently converted Mrs. Lillie's credit balance, or a portion of it, on July 2 and were thus guilty of embezzlement. Such a verdict, lacking as it well may the essential element of unanimity, does not meet with the requirements of the law regarding a trial by jury and is insufficient to support a judgment of guilty.

"In the case of *People v. Hatch,* 109 Pac. (Cal.) 1097, the defendant was indicted for embezzlement. In the course of the trial the prosecution introduced evidence tending to prove more than one embezzlement. The defendant made a motion for an election, which was overruled. In sending the case back for a new trial the court said (p. 1103): 'If there had been but one offense of embezzlement proven by the evidence this charge would have been correct; or if the court had limited the jury in clear and explicit language to the consideration of but one of the offenses proven. But in the case at bar, under the one charge set forth in the indictment several distinct and separate fraudulent appropriations had been proven, and no election had been made as to which was the substantive offense upon which the indictment was predicated. Under this instruction, in the condition of the evidence in the record, the jury could bring in a verdict of guilty as charged, although each juror founded his verdict upon a different offense from that considered proven by every other juror in the box. Under this instruction, the several jurors could range over the evidence, at will, and pick out any one of the dozen or more offenses proven, and found his verdict thereon. No court can say from this record of

which offense proven under this indictment the jury found the defendant guilty.' ''

Our Court also quotes with approval, *Love v. State,* 107 So. (Miss.) 667, in which incest was the charge; *Vinson v. The State,* 140 Tenn. 70, in which violation of the age of consent law was the charge; *Lee v. State,* 240 Pac. 148, in which rape was the charge; *People v. Davis,* 141 N.W. 667, in which adultery was the charge; *Commonwealth v. Coyne,* 207 Mass. 21, in which selling intoxicating liquor to a minor was the charge, and cites a host of other cases.

In *Territory v. Abellana,* 38 Haw. 532, although the action of the trial court permitting evidence of distinct crimes was upheld, the Supreme Court of Hawaii made it abundantly clear that it did so only because the facts of the case brought it within the purview of exceptions (quoting the language of the Court at page 537) "to the established rule that evidence of other crimes wholly independent of that for which a defendant is on trial is inadmissible."

The exceptions as stated in *Territory v. Abellana, supra,* at page 537 are:

(1) That evidence of other crimes is competent to prove the specific crime charged if it tends to establish a common scheme, plan or system embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, and

(2) When such evidence tends to aid in identifying the accused where his identity has not

been definitely connected with the offense on trial.

The Supreme Court of Hawaii in *Territory v. Abellana, supra,* cites with perfectly apparent approval, *Towne v. The People,* 89 Ill. App. 258, 283, as follows:

> "But the general rule is salutary, and departure from it is perilous, and hence courts are reluctant to extend the exception to the rule beyond well established lines. While the decisions of different jurisdictions vary somewhat as to the application of this exception to the rule, yet they are all in substantial accord upon the proposition that unless there be some apparent logical connection between the two offenses, either by reason of both being of the *res gestae,* or both being part of one system, or the one tending to show a *scienter* in the other, the general rule governs, and the exception to it does not apply."

The Supreme Court of Hawaii in the *Abellana* case emphasizes its agreement with the principles set out in *Towne v. People, supra,* by indicating that evidence of other crimes is not admissible unless "of such a correlative nature as to be considered competent proof within the issues framed under the indictment" (39 Haw. 532, 538); or, that it shows, "a common plan, scheme and system predicated in part upon the use of * * * the focal operative instrumentality employed" (p. 539); or, "were of an intervening extemporaneous, impromptu nature, and were in fact collaterally conceived" (p. 539).

A further insight into the thinking of the Supreme Court on this subject may be had from a perusal of other language used by the court. For instance, on page 539 of the opinion we find this:

> "* * * The intervening crimes committed within the cemetery were, however, converted into the primary crimes of a preconceived evening's undertaking of lawlessness employing the weapon and clip with four cartridges as a *modus operandi* in its development by preliminarily placing victims and potential victims in preludial fright or submission. These means, employed within a radius of two miles and within one hour each of the other, disclose a common plan, scheme and system embracing and collateral to the subsequent crimes testified to by the witness Rodrigues, thereby concentralizing them within the orbit of the evening's criminalisms."

The decision of the Supreme Court in the instant case strongly emphasizes the propriety of the rule excluding evidence of other crimes. To the two exceptions to the rule noted by the court in *Territory v. Abellana, supra,* the court in its decision in this case adds an exception, namely, that "it is probative of the corrupt intent which is in issue as an essential element of the crime charged."

It is respectfully submitted that evidence of other crimes cannot be admitted *"unless the acts are connected in some special way, indicating a relevancy beyond mere similarity in certain particulars."* (Italics supplied.) The quoted language is from page 635 of the report of this case in the court below (38 Haw.

628) which in turn cites 20 Am. Jur., Evidence, sec. 302, pp. 278-281 and cases there cited.

It is respectfully submitted that the Supreme Court fell into the error here complained of in supposing that because to convict of bribery it is necessary to show a corrupt intent it is permissible to adduce evidence of similar acts in which corrupt intent is also not shown. In other words, the theory of the court seems to be that to establish a corrupt intent all that is necessary is to offer proof of unrelated crimes all requiring proof of corrupt intent but as to none of which is there evidence of corrupt intent. The defendant is charged with corruptly accepting bribes from one Au. No evidence is produced of the corrupt intent so the prosecution submits testimony of an unrelated incident of an alleged bribe, which cannot be an offense without proof of corrupt intent, and there being none, submits testimony of another unrelated incident of an alleged bribe which cannot be an offense without proof of corrupt intent, and there being none, submits testimony of another unrelated incident, and so on *ad infinitum.*

SPECIFICATION OF ERROR NO. 2.

THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN HOLDING (WITHOUT GIVING ANY REASON FOR SO HOLDING) THAT DEFENDANT'S ASSIGNMENT OF ERROR COMMITTED BY THE TRIAL COURT IN DENYING HIS MOTION FOR A DIRECTED VERDICT, WAS WITHOUT MERIT, FOR THAT IN SO HOLDING DEFENDANT WAS DEPRIVED OF HIS RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES TO A FAIR AND IMPARTIAL TRIAL; NOT TO BE HELD TO ANSWER EXCEPT BY INDICTMENT; AND TO BE PROTECTED AGAINST ANOTHER PROSECUTION FOR THE SAME OFFENSE. (T. 179.)

When the prosecution rested, defendant moved for a directed verdict on the ground that there was a variance between the proof and the allegations of the indictments, in that the indictments charged defendant with receiving bribes from Paul Au whereas the proof was directed to showing that Paul Au paid bribes to Clark and that Clark paid bribes to defendant, and the motion was denied.

The indictments charged defendant with receiving bribes from Au on specified dates in August and September of 1945 and January of 1946. Au was permitted to testify, however, that before June 9, 1945, he had a conversation with Clark; that on the next day and about June 9, 1945, he reopened gambling at the Honolulu Rooms; and that ten days later he gave Bill Clark $900.00 for him and his boys, and one sealed envelope with $500.00 which he "instructed Bill Clark to give to Captain Caminos". Au testified that he gave bribes to Clark for defendant because Clark had said defendant would accept them.

The indictments alleged that defendant received bribes *from Paul Au.* They did not allege that Clark

was an instrumentality either in the paying or the receiving of the bribes. Au's testimony did not show that he paid any bribes *to defendant* or that defendant received any bribes *from Au.* What his testimony showed was that he paid bribes *to Clark* and that Clark might possibly have paid part thereof to defendant. Of course evidence that Clark received bribes *from Au* and paid part thereof *to defendant* would support a charge that defendant received bribes from Clark. (*State v. Sweenley,* 130 Minn. 450, 221 N.W. 225, 73 A.L.R. 380.) An acquittal of the charge of receiving bribes from Paul Au would not bar prosecution of defendant on a charge of receiving bribes *from Clark.* The Au testimony, therefore, was not proof corresponding to the allegations of the indictment.

SPECIFICATION OF ERROR NO. 3.

THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN HOLDING (WITHOUT GIVING ANY REASON FOR SO HOLDING) THAT THE DEFENDANT'S ASSIGNMENT OF ERROR COMPLAINING OF THE PREJUDICIAL MISCONDUCT OF THE TRIAL JUDGE AS A RESULT OF WHICH DEFENDANT WAS DENIED A FAIR TRIAL AND DEPRIVED OF THE DUE PROCESS OF LAW GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES AND THE BILL OF RIGHTS THEREIN CONTAINED WAS WITHOUT MERIT.

The prejudicial misconduct of the trial judge began at an early stage of the trial and persisted throughout its entire course. It consisted in belittling, berating, deprecating, rebuking, and lecturing defendant's counsel, and accusing them of being untruthful and unfair.

Defendant's counsel were accused of taking advantage of the court, of the prosecution, and of the witnesses (T. p. 144). They were accused of not "giving the witness a chance" (T. p. 153), of deliberately misconstruing the testimony of witnesses (T. 144), of manufacturing evidence (T. 147), and, (inferentially, at least) of being untruthful (T. 146-147). They were accused of diverting the attention of the jury from the issues before them (T. 147). They were accused of deliberately violating rules of evidence (T. 152). They were accused of lack of diligence (T. 151). They were referred to as "mind readers" (T. 89), and their objections were referred to as "Instructions" to the court (T. 69, 146). Their offer to submit cases in support of a point of law met with the response, "I am not wasting time now; you can do it with the appellate court" (T. 90). Their objection to a question as leading and argumentative evoked the remark, "The only leading part and the only argumentative part is contained in your objection, Mr. Patterson" (T. 100). Their request upon prosecution counsel for a stipulation respecting a photograph produced by the prosecution resulted in the rebuke, "There is no occasion to call for an admission; you're examining the witness." (T. 150.)

The prejudice to the cause of the accused is so highly probable here from the manifest misconduct of the trial judge and the adverse courtroom atmosphere thereby engendered that an appellate court would not be justified in assuming its nonexistence. (*Berger v. United States,* 295 U.S. 78, 55 S. Ct. 629,

633, 79 L. Ed. 1314.) "It is an important rule," said the court in *Grock v. United States,* 289 F. 544, 545, "that an attorney at law appearing in open court in the trial of a case is entitled to such treatment from the court that the interests of this client may not be prejudiced. That is not a matter of indulgence, but of right." Similar misconduct of a trial judge caused a reversal of the judgment and sentence in *Lau Lee v. United States,* 9 Cir. 1933, 67 F. (2d) 156, the court saying, at page 159:

> "We do not wish to be understood as holding that ordinarily an accusation by the judge in the presence of the jury that defendant's attorney is dishonest or attempting to mislead the jury can be cured by an instruction, even if the charge is wholly disavowed and withdrawn. Such a conclusion of bad motive should never be announced by a judge except in findings upon a formal charge of misconduct, and even then not in the presence of a jury trying another person for a crime. On the other hand, the court has the right to correct erroneous or misleading statements made by the attorneys with reference to the evidence and resulting prejudice to the defendant must be borne by them; but when the court goes further and not only impugns his conduct but also his motives, he has gone too far. The ultimate question in every criminal case is whether the defendant shall be deprived of his property or liberty or life, and that question should not be obscured or affected by the consideration of the motives of the defendant's attorney."

In *Starr v. United States,* 153 U.S. 614, 14 S. Ct. 919, 923-924, it was said:

"It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference and may prove controlling. *Hicks v. United States,* 150 U.S. 442, 452, 14 S. Ct. 144. The circumstances of this case apparently aroused the indignation of the learned judge in an uncommon degree; and that indignation was expressed in terms which were not consistent with due regard to the right and duty of the jury to exercise an independent judgment in the premises, or with the circumspection and caution which should characterize judicial utterance. * * * Whatever special necessity for enforcing the law in all its rigor there may be in a particular quarter of the country, the rules by which, and the manner in which, the administration of justice should be conducted, are the same everywhere; and argumentative matter of this sort should not be thrown into the scales by the judicial officer who holds them."

The attitude of the Supreme Court of Hawaii toward misconduct of a trial judge contributing to a conviction in a criminal action, and particularly where the misconduct is cumulative in character, is unmistakable. (*Territory v. Van Culin,* 36 Haw. 152.) In reversing a judgment and sentence it was there said, at pages 162 and 163:

"The essential requirements of a fair trial are simple and easily observed. Judges are as much judges for the defendant as for the Territory. They are supposed to sit fairly and impartially and to preserve impartially the legal rights of

both the Territory and the accused and not to insure victory or defeat for either side. To become a partisan for one or the other is to descend from the high position to which he, a judge, has been elevated and to assume the role of an advocate (cases cited). * * * Appellee argues that because there is ample evidence to establish defendant's guilt, the deprivation of a fair trial does not constitute reversible error. We cannot agree with this contention. Even the criminal most deserving of punishment is entitled, under our system, to a fair and impartial trial. More important than any verdict or judgment are the legal principles which govern the fundamental rights of all. The duty of the court to assure to a defendant in a criminal case a fair trial by a jury is of paramount importance. Justice is achieved only if this right is upheld. In our opinion, the conduct of the trial judge was calculated to discredit the defendant's defense at the time he was attempting to present it and the requirements of a fair and impartial trial have been violated. The motion for a new trial, therefore, should have been granted."

SPECIFICATION OF ERROR NO. 4.

THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN HOLDING (WITHOUT GIVING ANY REASON FOR SO HOLDING) THAT THE DEFENDANT'S ASSIGNMENT OF ERROR COMMITTED BY THE TRIAL COURT IN REFUSING TO INSTRUCT THE JURY AS TO THE LAW APPLICABLE TO THE CASE IN CERTAIN SPECIFIED RESPECTS AS REQUESTED BY DEFENDANT WERE WITHOUT MERIT, FOR THAT IN SO HOLDING DEFENDANT WAS DEPRIVED OF HIS RIGHT UNDER THE CONSTITUTION OF THE UNITED STATES TO A FAIR AND IMPARTIAL TRIAL AND TO THE EQUAL PROTECTION OF THE LAWS.

The trial court refused, though requested by the defendant, to give instructions to the jury in the following language:

> "I instruct you that in this case the defendant has offered witnesses for the purpose of showing his good character. When he does so he puts his character in issue, and having done so the prosecution was at liberty, under the law, to the prosecution was at liberty, under the law, to bring witnesses before the Court to show that the defendant was not a man of good character."

> "I instruct you that the prosecution has not produced any witnesses in this court tending to show that the defendant Caminos is not a man of good character or reputation; and the testimony of certain witnesses for the prosecution that is in conflict with the testimony of the defendant is not to be considered by you as character evidence but only for the purpose of deciding the issue in this case as to whether or not the defendant is guilty under the evidence in accordance with the instructions that have been given, and will be given, to you by this court."

> "You are instructed that if you should find and believe that the prosecution failed to produce

available evidence, in weighing the evidence in this case, you are entitled to consider the failure of the prosecution to produce witnesses and such evidence in arriving at your verdict in this case as to whether or not the defendant is guilty or not guilty."

The circuit court erred to the prejudice of defendant in refusing to give the requested instruction.

The general rule is stated in 20 American Jurisprudence 305-306, sec. 326, as follows:

"Although there is some difference of opinion as to the kind of evidence by which character may be proved, the generally prevailing rule is that testimony to prove the good or bad character of a party to a civil action or of the defendant in a criminal prosecution must relate and be confined to the general reputation which such person sustains in the community or neighborhood in which he lives or has lived. Thus, evidence on behalf of the state in a criminal prosecution attacking the character of the accused for the purpose of impugning him as a defendant, where he puts his good character in issue by introducing evidence to sustain the same, must be confined to his general reputation for the particular traits involved in the offense charged. Evidence of specific acts or of conduct of a person upon particular occasions, bearing upon his character, is usually held to be inadmissible. The admission of such evidence would raise collateral issues and divert the minds of the jurors from the matter in hand. It is manifestly unfair to compel a party to defend specific acts alleged on proof of bad reputation or char-

acter, although he must be prepared to defend his general reputation. This rule is applicable to evidence in rebuttal as well as to original testimony. Thus, the state in rebutting the evidence of the defendant's good character is confined to evidence showing his general reputation as to having a bad character, and not to specific acts derogatory to his good character."

And in *Josey v. United States,* D. C. 1943, 135 F. (2d) 809, it was said, at page 811:

"The prosecution may not initially attack the defendant's character (1 Wigmore, Evidence, 456, sec. 57). After a defendant has attempted to show his good character in his own aid, however, the prosecution may, in rebuttal, offer evidence of his bad character. (1 Wigmore, Evidence, sec. 58.) While evidence of good or bad character is restricted to general reputation, and does not extend to particulars, a witness to good character may be asked, on cross-examination, whether he had heard particular and specific charges, or rumors, against an accused, of acts inconsistent with the trait of character about which the witness has testified. (3 Wigmore, Evidence, sec. 988.)"

A defendant is not presumed to be of good character. (*Greer v. United States,* 245 U.S. 559, 38 S. Ct. 209, 210, 62 L. Ed. 469.) On the defendant is the burden of proving good character. (*Gibson v. United States,* 9 Cir. 1929, 31 F. (2d) 19, 24.) This defendant assumed that his character was good by general reputation. That proof strengthened the presumption

of his innocence. (20 American Jurisprudence 303, sec. 324.) Establishment of his good character would create a presumption that he did not commit the crimes of which he was accused. (*Edington v. United States,* 164 U.S. 361, 17 S. Ct. 72, 41 L. Ed. 467.) In one of the instructions in this case the court told the jury that "good character itself may create a reasonable doubt and entitle the defendant to an acquittal, even though without such proof of good character you would convict".

To rebut the evidence of good character the prosecution was at liberty, under the law, to bring witnesses before the court to show that defendant's character was bad by general reputation. Although the court ruled otherwise, as discussed in earlier parts of this brief, the prosecution *was not* at liberty, under the law, to bring witnesses before the court to show *specific* acts derogatory to defendant's good character.

Good character was a vital factor in the defense to the charges. Defendant was therefore entitled to have the jury fully, fairly, and definitely instructed on the subject. He was entitled to have the jury properly informed of the type of evidence to which he was confined in showing good character and of the type of evidence to which the prosecution was confined in showing bad character. He was entitled to have the jury so instructed that in weighing the evidence on the subject it could follow and apply the commonplace rule that evidence is to be estimated not only by its own intrinsic weight but also accord-

ing to the evidence which it is in the power of one side to produce and of the other side to contradict.

The state of the evidence and the law on the subject clearly demanded the giving of the requested instruction and its refusal was manifest error operating to the unmistakable prejudice of the defendant.

SPECIFICATION OF ERROR NO. 5.

THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN HOLDING (WITHOUT GIVING ANY REASON FOR SO HOLDING) THAT DEFENDANT'S ASSIGNMENT OF ERROR COMMITTED BY THE TRIAL COURT IN GIVING THE FOLLOWING INSTRUCTION REQUESTED BY THE PROSECUTION, TO-WIT: TERRITORY'S REQUESTED INSTRUCTION NO. 8: "THE COURT FURTHER INSTRUCTS YOU, GENTLEMEN OF THE JURY, THAT IF YOU FIND FROM THE EVIDENCE IN THIS CASE BEYOND A REASONABLE DOUBT THAT THE DEFENSE SET UP BY THE DEFENDANT IS A FALSE AND FABRICATED DEFENSE AND WAS PURPOSELY AND INTENTIONALLY INVOKED BY THE SAID DEFENDANT THEN YOU ARE INSTRUCTED THAT SUCH A FALSE AND FABRICATED DEFENSE FORMS THE BASIS OF A PRESUMPTION AGAINST HIM BECAUSE THE LAW SAYS THAT HE WHO RESORTS TO PERJURY TO ACCOMPLISH AN END, THIS IS AGAINST HIM AND YOU MAY TAKE SUCH ACTION AS THE BASIS OF PRESUMPTION OF GUILT" WAS WITHOUT MERIT, FOR THAT IN SO HOLDING DEFENDANT WAS DEPRIVED OF HIS RIGHT UNDER THE CONSTITUTION OF THE UNITED STATES TO A FAIR AND IMPARTIAL TRIAL AND TO THE DUE PROCESS OF LAW.

There is no "presumption" of guilt in criminal actions. Any "presumption" of that character would be utterly incompatible with the due process of law safeguarded by the Bill of Rights. The pervading presumption in every criminal action is the presump-

tion of innocence. That presumption accompanied the defendant as he comes into court and it abides with him at every stage of the trial. (*Gomila v. United States,* 5 Cir. 1944, 146 F. (2d) 372; *Gargotta v. United States,* 8 Cir. 1935, 77 F. (2d) 977.)

In *Gomila v. United States,* 146 F. (2d) 372, it was said at page 373:

> "The statement that the presumption of innocence 'was not intended, nor has it ever been intended, as extending an aid to one, who in fact is guilty, so that he may escape just punishment,' is not a correct statement of the law. The presumption of innocence applies alike to the guilty and to the innocent, and the burden rests upon the Government throughout the trial to establish by proof beyond a reasonable doubt the guilt of the accused. Until guilt is established by such proof, the defendant is shielded by the presumption of innocence. The fact of guilt does not enter into the application of the rule, the extent and nature of which is to protect all persons coming before the court charged with crime until the presumption of innocence is overthrown by evidence establishing guilt beyond a reasonable doubt; and where the evidence is purely circumstantial, to the exclusion of every reasonable hypothesis of innocence."

And in *Gargotta v. United States,* 77 F. (2d) 977, it was said, at page 981:

> "The defendant is presumed to be innocent, and this presumption is a real presumption in his favor which abides with him at every stage of the trial. The burden of proof was on the government to prove his guilt beyond a reason-

> able doubt. No principles of criminal law are more firmly fixed than these. They have been proclaimed by every court of record throughout the land. They go to the very basis of our liberties."

Here the effect of the challenged instruction was to tell the jury that if the defense was false the presumption of innocence was supplanted by a "presumption" of guilt. And here the effect of the challenged instruction was to invite the jury to find the defendant guilty if it found his defense false. But a false defense cannot convert a false charge into a true one. No matter how false a defense may be a defendant is still presumed to be innocent of the *charge* against him and the burden of proof still rests on the prosecution to prove the defendant guilty of the *charge* beyond a reasonable doubt.

That the giving of the instruction was prejudicial error cannot be doubted under the decision of the Supreme Court in *Bollenbach v. United States,* 326 U.S. 607, 66 S. Ct. 402, 406, 90 L. Ed. 350. There a jury had been instructed respecting a "presumption" that the defendant was a thief. This was held prejudicial error, the court saying:

> "It would indeed be a long jump at guessing to be confident that the jury did not rely on the erroneous 'presumption' given them as a guide. A charge should not be misleading. * * * Legal presumptions involve subtle conceptions to which not even judges always bring clear understanding. * * * In view of the Government's insistence that there is abundant evidence to indicate

that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts."

CONCLUSION.

For the reasons herein set forth the judgment of the Supreme Court of Hawaii should be reversed.

Dated, Honolulu, Hawaii,
March 30, 1951.

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